No. 83-1664

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIAM BAIRD, et al.,
Petitioners,

v.

FRANCIS X. BELLOTTI, et al.,
Respondents.

On Petition for a Writ
of Certiorari to the United
States Court of Appeals
for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court properly exercised its discretion under 42 U.S.C. § 1988 in denying petitioners' application for attorney's fees, based on detailed factual findings that petitioners' thirty-month delay in filing their fee application unfairly prejudiced the respondent.

2. Whether the Court of Appeals erred as a matter of law in affirming the District Court's discretionary denial of attorney's fees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Francis X. Bellotti, the Attorney General of the Commonwealth of Massachusetts, respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

STATEMENT OF THE CASE

The questions presented by this petition arise from the lower courts' denial of petitioners' application for attorney's fees under 42 U.S.C. § 1988 on the grounds that petitioners' thirty-month delay in seeking fees operated to the unfair prejudice of the respondent. The underlying case, which concluded in 1979, successfully challenged the constitutionality of a Massachusetts statute imposing criminal penalties for performing abortions on minors without parental consent.

The essential facts and procedural events of this case, as they pertain to the present petition, are as follows: The complaint was filed on October 30, 1974. Pursuant to plaintiffs' request, a three-judge court was convened, which heard plaintiffs' motion for a prelimin-

ary injunction consolidated with the merits of the case. On April 28, 1975, the three-judge court declared Mass. Gen. Laws c. 112, § 12P, unconstitutional and permanently enjoined its enforcement. Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975). In its decision, the court denied plaintiffs' claim for attorney's fees against the defendants. Id. at 857. The defendants and defendant-intervenor appealed to this Court, which vacated the three-judge court's judgment on the merits, leaving the denial of attorney's fees intact, and remanded the case for certification of the state-law questions to the Supreme Judicial Court for the Commonwealth of Massachusetts. Bellotti v. Baird, 428 U.S. 132 (1976). After the Supreme Judicial Court answered the cer-

tified questions, Baird v. Attorney General, 371 Mass. 741, 360 N.E.2d 288 (1977), further hearings on the merits were held before the three-judge court. On May 2, 1978, that court reaffirmed its decision holding the statute unconstitutional and enjoining its enforcement. Baird v. Bellotti, 450 F. Supp. 997 (D. Mass. 1978). No request for attorney's fees was filed at that time.

Defendants and defendant-intervenor once again appealed to this Court, which affirmed the judgment of the District Court on July 2, 1979. Bellotti v. Baird, 443 U.S. 622 (1979). On October 1, 1979, this Court denied defendants' petition for rehearing. Id., 444 U.S. 887 (1979).

On April 20, 1982, almost four years after the three-judge court's final

judgment, and almost three years after the Supreme Court's denial of rehearing, plaintiffs' counsel filed their Motion for Attorney's Fees, seeking payment for services rendered and expenses incurred in connection with all proceedings before the three-judge court, the Supreme Judicial Court for the Commonwealth of Massachusetts, and this Court. In the meantime, all of the assistant attorneys general who had primary responsibility for litigating the underlying case had left the Attorney General's office. Therefore, no one presently employed as an assistant attorney general has personal knowledge of the intricate course of the underlying litigation or of the respective roles played in that litigation by the various counsel for the plaintiffs. The former assistant attorneys general

who worked on the underlying case from 1974 through 1979 have only a very limited recollection of the nature, quality, and amount of services rendered by various counsel for the plaintiffs and, furthermore, are presently employed fulltime by other employers. They therefore indicated that they could be of little assistance to defendants' present counsel in preparing an effective opposition to plaintiffs' application for attorney's fees.

Furthermore, as is the usual practice with closed cases, the defendants' files in this case were sent to storage after this Court's final decision in this case. Despite concerted efforts by defendants' counsel and by clerical workers under their supervision, counsel were unable to locate and retrieve significant portions of the files in this case, particu-

larly those relating to the early proceedings before the three-judge court, which were conducted during the administration of a previous attorney general. Even the District Court's files in this matter appear to be somewhat incomplete.

On May 20, 1982, defendants moved to dismiss plaintiffs' fee application on the grounds, inter alia, that plaintiffs' lengthy and unjustified delay in seeking fees unfairly prejudiced defendants' ability to effectively oppose that application. At the request of plaintiffs' counsel, the District Court (Aldrich, S.C.J., sitting by designation) held a hearing on defendants' Motion to Dismiss on October 4, 1982.[1/]

1/ Plaintiffs' counsel withdrew their request for a hearing immediately prior to the scheduled date for the hearing, but the hearing was held nevertheless.

On December 13, 1982, the District Court issued an Opinion, finding that plaintiffs' substantial and unjustified delay in seeking attorney's fees unfairly prejudiced the defendants and concluding that plaintiff's fee application should therefore be dismissed. Petition at 31a. Plaintiffs appealed from that decision to the United States Court of Appeals for the First Circuit, which affirmed the District Court's dismissal of plaintiffs' fee application on January 13, 1984. Petition at 1a-10a.

REASONS FOR DENYING THE WRIT

As provided in Rule 17 of the Rules of this Court, "review on a writ of certiorari is not a matter of right but judicial discretion, and will be granted only when there are special and important

reasons therefor." See also Ross v. Moffitt, 417 U.S. 600, 617 (1974); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); Wade v. Mayo, 334 U.S. 672, 680 (1948). No such "special and important reasons" warrant the granting of that extraordinary writ in this case. Furthermore, there are several reasons why granting the writ in this case would be particularly inappropriate.

I. CERTIORARI IS NOT APPROPRIATE TO REVIEW A LOWER COURT'S DISCRETIONARY AND FACT-SPECIFIC DECISION TO DISMISS AN UNTIMELY APPLICATION FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

As noted by Justice Brennan in Appalachian Power Co. v. American Institute of Certified Public Accountants, 80 S. Ct. 16, 18 (1959), certiorari is not ordinarily granted where "the question is one that concerns the judgment of the

District Judge in relation to a particular set of facts." This is precisely such a case. In dismissing plaintiffs' application for fees, the District Court simply applied the standards for assessing the timeliness of a fee application articulated by this Court in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), to the particular facts of this case. Its discretionary and fact-specific judgment--that plaintiffs' thirty-month delay in seeking fees unfairly prejudiced defendants--which has been reviewed and affirmed by the Court of Appeals, should not be subjected to further review by this Court.

A. Whether to Award Attorney's Fees Under 42 U.S.C. § 1988 Rests in the Sound Discretion of the District Court.

Discretion lies at the heart of § 1988. The statute itself expressly

provides that "the court, in its discretion, may allow the prevailing party a reasonable attorney's fee" (emphasis added). The legislative history of § 1988 also emphasizes the discretionary nature of fee awards under that statute. The House Report states: "The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976).

In accordance with the literal language and legislative history of the statute, it has been consistently construed to vest broad discretion in the trial court to determine whether a fee is warranted in light of the nature and procedural history of each particular case. See, e.g., Hutto v. Finney, 437 U.S. 678, 709 n. 7 (1978) (Powell, J., concurring) ("there is nothing in the Act

that requires the routine imposition of counsel-fee liability on anyone"). As expressly held by this Court in White v. New Hampshire Department of Employment Security, supra at 454, "this discretion will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party."

B. The District Court Properly Exercised Its Discretion to Deny Attorney's Fees to Plaintiffs in This Case.

The District Court's conclusion that "there is a probability of substantial prejudice" to the defendants as a result of plaintiffs' thirty-month delay in seeking fees, Petition at 31a, was reached after "ponder[ing] this matter deeply." Id. The District Court's careful consideration of the issue of unfair prejudice is reflected in its specific

and detailed findings as to the length of the delay, the lack of any reasonable justification for the delay, and the prejudicial effect of the delay on the defendants. Petition at 17a-28a. In affirming the District Court's decision, the Court of Appeals, "[b]earing in mind that the district court . . . retains primary discretion in these matters, . . . [saw] no basis to reverse its denial of fees . . . ." Petition at 7a. Rather, the Court of Appeals held as follows:

> The district court was within its discretion in finding that the prejudicial elements with respect to [plaintiffs'] fee request created "a strong probability of prejudice." The factors it enumerated, when coupled with the extraordinary, unjustified length of the delay, constitute a level of actual prejudice sufficient to meet the Supreme Court's standard for the denial of attorneys' fees under 42 U.S.C. § 1988.

Since, as recognized by the Court of Appeals, the District Court properly exercised its discretion to deny plaintiffs' untimely fee application, further review by this Court is inappropriate and unwarranted.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT IN PRINCIPLE WITH DECISIONS OF OTHER COURTS ON THE ISSUES PRESENTED BY THIS PETITION.

Not only is the lower courts' denial of fees in this case consistent with this Court's holding in White v. New Hampshire Department of Employment Security, supra, but it is also consistent with the decisions of other courts both prior to and after the White case.

Even prior to this Court's decision in White, several lower courts recognized that fee petitions could be denied if not filed within a reasonable time after judgment. For example, in Northcross v.

Board of Education, 611 F.2d 624, 635 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980), the court held a petition filed soon after the denial of certiorari by this Court to be timely, distinguishing such a situation from "a case where, years after a case has been finally disposed of, the prevailing party seeks to reopen the case to litigate the fee issue." Similarly, in Gary v. Spires, 634 F.2d 772, 775 (4th Cir. 1980), a claim for attorney's fees filed approximately two months after the entry of judgment was denied on equitable grounds.[2/]

2/ See also Glass v. Pfeffer, 657 F.2d 252, 255 (10th Cir. 1981); Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), aff'd on other grounds, 646 F.2d 149 (4th Cir. 1981); DuBuit v. Harwell Enterprises, Inc., 540 F.2d 690, 693 (4th Cir. 1976); Stacy v. Williams, 446 F.2d 1366, 1367 (5th Cir. 1971); Hill v. TVA, 84 F.R.D. 226, 227 (E.D. Tenn. 1979); Fase v. Seafarers Welfare & Pension Plan, 79

(footnote continued)

In the wake of White, the courts of appeals have accordingly applied the equitable standards of unfair prejudice and surprise in assessing the timeliness of post-judgment applications for fees. See, e.g., White v. New Hampshire Department of Employment Security, 679 F.2d 283 (1st Cir. 1982) (on remand, the First Circuit held that fees were properly allowed where trial court found no unfair prejudice or surprise resulting from four-and-a-half-month delay in seeking fees); Inmates of Allegheny County Jail v. Pierce, 716 F.2d 177 (3rd Cir. 1983) (district court did not abuse discretion in awarding fees to party who filed application six months after hearing on re-

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(footnote continued)

F.R.D. 363, 366 (E.D. N.Y.), aff'd, 589 F.2d 112 (2d Cir. 1978) (all holding that fees must be sought within a brief time after entry of judgment).

mand, where defendants asserted no unfair surprise or prejudice); Neidhardt v. D.H. Holmes Co., 701 F.2d 553 (5th Cir. 1983) (fee claim filed two months after judgment of court of appeals, remanded for consideration of whether opposing party was unfairly surprised or prejudiced by timing of motion); Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983) (fee application filed eight months after entry of judgment, remanded for consideration of whether opposing parties were prejudiced by delay); Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1248 (7th Cir. 1982), aff'd on other grounds, 104 S. Ct. 1464 (1984) (district court did not err in awarding fees to applicant who filed request within 18 days after entry of judgment where defendant did not allege that it was prejudiced in any way by delay); Metcalf

v. Borba, 681 F.2d 1183, 1187 (9th Cir. 1982) (fee petition filed 25 days after entry of judgment properly allowed where timing of request did not unfairly surprise or prejudice defendants); Brown v. City of Palmetto, 681 F.2d 1325, 1327 (11th Cir. 1982) (fee petition filed more than four months after entry of judgment properly allowed where affected party failed to make any showing of unfair prejudice or surprise).[3/]

3/ Contrary to petitioners' contention, Petition at 17, no "direct conflict" exists between the Court of Appeals' decision in this case and that of the Sixth Circuit in Brinkman v. Gilligan, 697 F.2d 163 (6th Cir. 1983). Petition at 17. In Brinkman the issue of timeliness apparently was not raised as a defense to the fee claim either in the district court or on appeal, which is not surprising, since the trial court's decision in that case preceded this Court's decision in White. More recently, the Sixth Circuit remanded a case to the district court for consideration of whether a fee applicant's eight-month delay in seeking fees prejudiced the opposing parties. Fulps v. City of Springfield, supra.

In an apparent attempt to avoid the weight of the above-cited precedents, plaintiffs rely on other cases that are readily distinguished from the present one. In the cases on which plaintiffs rely, unlike in the present case, fees were sought while post-judgment proceedings were still on-going or shortly after those proceedings were concluded. Petition at 17-18.[4/] As recognized by the

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4/ Citing David v. Travisono, 621 F.2d 464, 465 (1st Cir. 1980) (timeliness of petition not raised; plaintiffs had sought and received extension of time to file fee request); Brewster v. Dukakis, 544 F. Supp. 1069, 1073 (D. Mass. 1982) (fee petition not untimely where "negotiation, monitoring and litigation have unfolded continuously from the initiation of the suit to the present"); Northcross v. Bd. of Educ., supra at 635 (fee petition not untimely where "case was in continuous, active litigation . . . until shortly before the application for fees was made"); Mills v. Eltra Corp., 663 F.2d 760 (7th Cir. 1981) (issue of timeliness not raised; no indication that fee applicant delayed in seeking fees after

(footnote continued)

District Court, those cases are clearly inapposite to the present situation, in which fees were sought almost three years after the underlying litigation had finally concluded. Petition at 28a n. 12. Indeed, in several of the cited cases the court itself distinguished those cases from situations like the present one, where fees are sought long after the final conclusion of the underlying case. See Brewster v. Dukakis, supra at 1073; Northcross v. Board of Education, supra at 635.

In sum, not only is the Court of Appeals' decision in this case entirely consistent with this Court's holding in

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(footnote continued)

underlying case was finally disposed of); Gautreaux v. Chicago Hous. Auth., 690 F.2d 601, 611-12 (7th Cir. 1982), cert. denied, 103 S. Ct. 2438 (1983) (fee petition not untimely where fees were sought while litigation was still pending.

White and with the decisions of all of the other courts of appeals that have ruled on the issue of the timeliness of fee petitions, but plaintiffs have cited no case, either in their present petition or below, in which any court has held a nearly three-year delay in seeking fees to be permissible.

CONCLUSION

For all of the above reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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